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MEMORANDUM

TO: Committee on Legal Services

FROM: Megan Waples, Office of Legislative Legal Services

DATE: December 5, 2018

SUBJECT: Rules of the Director of the Division of Fire Prevention and Control, concerning the Colorado fire suppression program, 8 CCR 1507-11 (LLS Docket No. 180083; SOS Tracking No. 2017-00619).¹

Summary of Problems Identified and Recommendations

Section 24-4-104 (6), C.R.S., states that "[e]xcept as provided in subsection (4) of this section, an agency shall not revoke [or] suspend...a previously issued license until after holding a hearing as provided in section 24-4-105." But rule 10.5.1 of the rules of the Director of the Division of Fire Prevention and Control (Division) allows a registration or certification to be suspended for a single, substantiated violation that does not constitute a serious threat to the public health, safety, and welfare. And rule 10.5.4 provides that "[n]otices of suspension...will be issued as Letters of Admonition in accordance with Section 10.4." Rule 10.4, in turn, provides that letters of admonition will be delivered by certified mail. None of these rules requires a hearing before issuing a notice of suspension. **Because these rules conflict with the statute, we recommend that Rules 10.5.1 and 10.5.4 of the rules of the Director of the**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8)(c)(I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2019, unless the General Assembly acts by bill to postpone such expiration.

Division of Fire Prevention and Control concerning Colorado's fire suppression program not be extended.

Section 24-5-101, C.R.S., provides that a conviction for a felony or other offense involving moral turpitude shall not, by itself, prevent a person from obtaining a license or registration required by law to follow a business, occupation, or profession. But Rule 5.5.1.4 allows the Division to deny an application for registration when the applicant has been convicted of any "crime which reflects upon the integrity of the applicant." **Because the rule conflicts with the statute, we recommend that Rule 5.5.1.4 of the rules of the Director of the Division of Fire Prevention and Control concerning Colorado's fire suppression program not be extended.**

Analysis

1. Rules 10.5.1 and 10.5.4 conflict with statute because they allow the Division to suspend a certification or registration without holding a hearing.

Under Colorado law, a business license is a "property right which is entitled to due process protection."² To provide that protection, the "State Administrative Procedure Act" (APA), article 4 of title 24, C.R.S., generally requires that a licensee receive notice and an opportunity to be heard before the state takes action against that right.³ Specifically, section 24-4-104 (6), C.R.S., provides:

24-4-104. Licenses – issuance, suspension or revocation, renewal.

(6) Except as provided in subsection (4) of this section, an agency shall not revoke, suspend, annul, limit, or modify a previously issued license until after holding a hearing as provided in section 24-4-105.

The APA defines a license to include "any agency permit, certificate, [or] registration" in section 24-4-102 (7), C.R.S.

As an exception to the general requirement to have a hearing before taking action, subsection 24-4-104 (4), C.R.S., allows a summary suspension of a license when the violation is willful and deliberate or the agency finds that emergency action is necessary:

² *Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022 (Colo. 1979).

³ See, e.g., *Weiss v. Dep't of Public Safety*, 847 P.2d 197, 199 (Colo. App. 1992); § 24-4-105 (1), C.R.S.

24-4-104. Licenses – issuance, suspension or revocation, renewal.

(4) (a) Where the agency has objective and reasonable grounds to believe and finds, upon a full investigation, that the **licensee has been guilty of deliberate and willful violation or that the public health, safety, or welfare imperatively requires emergency action and incorporates the findings in its order, it may summarily suspend the license pending proceedings for suspension or revocation which shall be promptly instituted and determined.** For purposes of this subsection (4), "full investigation" means a reasonable ascertainment of the underlying facts on which the agency action is based. **(Emphasis added.)**

Rule 10.5 of the Division's rules, however, allows the agency to suspend a registration by sending a notice by registered mail. There is no provision for a hearing, even upon the request of a licensee:

10.5 Suspensions

10.5.1 A registration or certification may be suspended for a single, substantiated violation of these rules which, in the opinion of the F&LSS Chief, constitutes a serious violation but which does not constitute a serious threat to public health, safety, and welfare. Suspensions will also be issued to individuals and/or companies for repeated violations as indicated in Sections 10.3 and 10.4.

....

10.5.4 Notices of suspension or denial will be issued as Letters of Admonition in accordance with Section 10.4. (Emphasis added.)

Neither Rule 10.4 nor Rule 10.5 contain any provision allowing for or requiring a hearing. Instead, Rule 10.4.4 provides: "Letters of Admonition will be delivered by certified mail to the address provided on the certification or registration application." None of the Division's rules related to suspensions require a hearing before suspending a license, in violation of section 24-4-104 (6), C.R.S.

Furthermore, the Division's rule specifies that a suspension is only appropriate where the violation "does **not** constitute a serious threat to public health, safety, and welfare" (Emphasis added.) Nor does the rule require a finding that a violation is willful or deliberate before allowing a summary suspension pending proceedings. Therefore, the rule's provisions also fall outside the scope of the exception created in subsection 24-4-104 (4), C.R.S. In addition, that subsection still requires a hearing to be promptly instituted following a summary suspension, which the rules do not provide.

Because the rules allow the Division to suspend a license without a hearing, they conflict with the statute.

2. Rule 5.5.1.4 conflicts with statute because it allows the Division to deny an application for registration solely on the basis of a criminal conviction.

Section 24-33.5-1206.7 (1), C.R.S., requires a person to be registered with the state fire suppression administrator, who is the director of the Division, in order to work as a sprinkler fitter:

24-33.5-1206.7. Sprinkler fitters - registration required – rules. (1) No person shall act, assume to act, or advertise as a sprinkler fitter who is not registered with the administrator.

Under section 24-5-101 (1)(a), C.R.S., when a registration is required by law to engage in a profession, an agency cannot deny an application based solely on a criminal conviction:

24-5-101. Effect of criminal conviction on employment rights. (1) (a) Except as otherwise provided in paragraph (b) of this subsection (1), **the fact that a person has been convicted of a felony or other offense involving moral turpitude shall not, in and of itself, prevent the person from applying for and obtaining public employment or from applying for and receiving a license, certification, permit, or registration** required by the laws of this state to follow any business, occupation, or profession. **(Emphasis added.)**

Subsection (1)(b) of that section exempts certain licenses, but does not exempt the registration for sprinkler fitters.

The Division's rules, however, allow the Division to deny an application based solely on a criminal conviction:

5.5 Denial of Application

5.5.1 The Division may deny any application for registration for the following reasons:

1. False statements on the application form or in any of the attachments required for registration;
2. Failure to meet or complete all requirements specified within the application;
3. The applicant is currently barred from registration, certification, or licensure by another State agency, governing body, or local jurisdiction.
- 4. The applicant has been convicted of a crime which reflects upon the integrity of the applicant in operating within the capacity for which they are applying;**

5. The applicant has been terminated from employment from a registered fire suppression contractor, fire authority, or other governing body for engaging in negligent or unsafe work or construction practices. **(Emphasis added.)**

While section 24-33.5-1206.7 (6) allows the administrator to "promulgate rules as necessary for the implementation" of the section, it does not authorize the Division to deny a registration based on a criminal conviction. In the absence of specific statutory authority to do so, the Division's rule conflicts with section 24-5-101 (1), C.R.S.

3. Finally, nothing in the agency's grant of rulemaking authority allows it to depart from the requirements of the APA or the criminal conviction law.

Section 24-33.5-1204.5 (1)(a), C.R.S, grants the state fire suppression administrator, who is the director of the Division or the director's designee, to adopt rules as necessary to administer the fire suppression program. It does not, however, exempt the program from the requirements of the APA or section 24-5-101, C.R.S.

Recommendation

We therefore recommend that Rules 5.5.1.4, 10.5.1, and 10.5.4 of the rules of the Director of the Division of Fire Prevention and Control concerning Colorado's fire suppression program not be extended because they conflict with the requirements of sections 24-5-101 and 24-4-104, C.R.S.